out affording it separate, independent notice and an opportunity to be heard violated its constitutional right to procedural due process. Petitioner also challenged the validity of Medicare's imposition of successor liability for civil money penalties. Pet. App. 7a-8a, 36a-37a.

The district court held that it lacked subject matter jurisdiction over petitioner's procedural due process claim. Pet. App. 36a. The court reasoned that petitioner had notice of the administrative review proceedings, a right to participate in those proceedings, and a right to seek judicial review of any final administrative decision. *Id.* at 34a-35a. The court concluded that petitioner "cannot circumvent the administrative review process by filing for review in district court [and] by framing its claim as one arising under the Constitution rather than under the Medicare Act." *Id.* at 35a.

The district court held, however, that it had subject matter jurisdiction over petitioner's challenge to the substantive validity of Medicare's successor-liability policy, reasoning that the claim arises under the Due Process Clause of the Constitution and therefore is not subject to Medicare's jurisdictional limitations. Pet. App. 36a-37a. The court then rejected petitioner's challenge on the merits. *Id.* at 37a-39a.

4. The court of appeals affirmed the judgment, holding that the district court lacked subject matter jurisdiction over all of petitioner's claims absent exhaustion of Medicare's administrative remedies. The court reasoned that all of petitioner's claims arise under the Medicare Act because petitioner's suit sought to avoid a Medicare administrative penalty. Pet. App. 14a. The court concluded that, under *Illinois Council*, *supra*, judicial review of such claims is contingent on presentment of a claim to the Secretary and exhaustion of ad-

ministrative remedies—requirements petitioner had not satisfied. Pet. App. 10a-15a.

The court of appeals further concluded that requiring petitioner to exhaust Medicare's administrative remedies would not effectively foreclose all judicial review. First, the court reasoned that all of petitioner's claims could have been raised and considered in either an administrative appeal of the civil money penalty determination or in an action for judicial review of a final administrative decision. Pet. App. 16a-18a. Second, petitioner was a party with standing to contest the imposition of civil penalties in the administrative proceedings and therefore had an effective administrative remedy. *Id.* at 18a-20a. Third, petitioner had notice that its rights were affected by the pendency of hearings on whether to impose a civil money penalty against the nursing facility. The court observed that the record showed petitioner had been served directly with motions in the civil money penalty proceedings, and that those motions disclosed that petitioner could be held accountable as a successor for any civil money penalty imposed against the prior operator of the nursing facility. *Id.* at 20a. Finally, the court held that the remedies under Medicare's scheme for administrative and judicial review precluded the district court from exercising mandamus jurisdiction over petitioner's suit under 28 U.S.C. 1361. Pet. App. 22a-24a.

ARGUMENT

Petitioner argues that Medicare imposes successor liability for civil money penalties without fair procedures (Pet. 6-11) and that the district court had jurisdiction under 28 U.S.C. 1331 to entertain that claim (Pet. 12-15). The court of appeals correctly held that jurisdiction over

petitioner's claim was foreclosed by 42 U.S.C. 405(h), because petitioner had not channeled its claims through procedures established under the Medicare Act. That holding does not merit further review by this Court.

1. There is a substantial question as to whether this case will continue to present a justiciable controversy. The petition states that petitioner and its corporate successors have ceased operations and dissolved. Pet. ii. The Department of Health and Human Services, moreover, has informed this Office that the Barbara Parke provider agreement assigned to petitioner has been assigned to another provider, and that, pursuant to Medicare's successor-liability policies, measures to collect the disputed civil money penalty have been instituted against the new provider. Where, as in this case, a skilled nursing facility participates in both Medicare and Medicaid, the Secretary's administrative practice is to allocate the civil money penalty between the two programs in accordance with the proportion of program beneficiaries served by the facility. We are further informed that the Secretary, on May 27, 2005, fully collected the Medicare portion of the civil money penalty from the new assignee, and that State Medicaid officials have instituted collection measures against the same party for the remainder of the civil money penalty. This case is accordingly a poor vehicle for considering the issues presented in the petition.

2. In any event, the court of appeals' jurisdictional holding is correct and does not conflict with the decisions of this Court or of other courts of appeals.

This Court's precedents make clear that federal court jurisdiction over claims arising under the Medicare statute is conditioned on presentment of the claim to the Secretary and exhaustion of administrative

remedies. *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 7-14 (2000); *Heckler* v. *Ringer*, 466 U.S. 602, 614-619 (1984). In *Illinois Council*, the Court stressed that, under its prior precedents, so long as the claim arises under Medicare, the nature of the claim has no bearing on whether it must be channeled through the exclusive administrative and judicial review provisions of the Medicare statute:

> Those cases themselves foreclose distinctions based upon the "potential future" versus the "actual present" nature of the claim, the "general legal" versus the "fact-specific" nature of the challenge, the "collateral" versus "noncollateral" nature of the issues, or the "declaratory" versus "injunctive" nature of the relief sought. Nor can we accept a distinction that limits the scope of § 405(h) to claims for monetary benefits. Claims for money, claims for other benefits, claims of program eligibility, *and claims that contest a sanction or remedy* may all similarly rest upon individual fact-related circumstances, may all similarly dispute agency policy determinations, or may all similarly involve the application, interpretation, or constitutionality of interrelated regulations or statutory provisions. There is no reason to distinguish among them in terms of the language or in terms of the purposes of §405(h).

Illinois Council, 529 U.S. at 13-14 (emphasis added).

Petitioner's attempts to avoid the clear mandate of Section 405(h) are without merit and do not establish any error in the court of appeals' holding. First, contrary to petitioner's contentions (Pet. 12-13), the fact that petitioner has not sought review of a final administrative decision and has instead framed a claim for equi-

table relief for an alleged constitutional violation does not relieve it of the obligation to present a claim to the Secretary and to exhaust administrative remedies. Rather, the presentment and exhaustion requirements apply to any claim "arising under" the Medicare statute, a standard that looks to whether the standing and substantive basis for the claim derive from the Medicare statute. *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975). As the court of appeals correctly concluded (Pet. App. 14a-15a), petitioner's claims, at bottom, challenge the imposition of a remedy for violation of substantive Medicare requirements and thus plainly "arise under" the Medicare Act. Section 405(h) and its attendant requirements of presentment and exhaustion of remedies accordingly apply with full force to petitioner's claims.

Second, petitioner's contention (Pet. 13-15) that it had no avenue of administrative and judicial review under Medicare's statutory and regulatory scheme is incorrect. The court of appeals held that the Secretary's regulations expressly contemplate that any "affected party" may request an administrative hearing to contest a proposed civil money penalty, and that petitioner, as an assignee of the pertinent provider agreement and potentially liable successor-in-interest, therefore had standing and an adequate opportunity to seek administrative and judicial review of the penalty determination. Pet. App. 19a-21a. The court concluded that the Secretary's regulations focus on the affected nursing facility's right to notice and a hearing with respect to a civil penalty, and that the agency's administrative hearing and appeal processes are accordingly open to any "affected party," which would include any provider with a stake in the outcome in the penalty determination. *Id.* at 19a-20a. The court explained that

> the regulations define parties to the administrative proceedings functionally, with respect to their stake in the outcome; they do not define them formally with respect to whether the provider seeking to participate is the same one served with a notice of right to hearing.

Id. at 20a.

The regulations accordingly would have permitted petitioner to participate in the administrative hearing commenced by West Chester, to move the ALJ to vacate the order dismissing that administrative appeal, or to seek a Departmental Appeals Board order reversing the dismissal of the administrative appeal. Pet. App. 20a-21a.[1] That conclusion is consistent with the Secretary's view of a successor's hearing rights and demonstrates that petitioner had a fully adequate administrative and judicial remedy under Medicare.[2]

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[1] The Secretary's regulations permit the ALJ to vacate a dismissal of a hearing request for good cause when sought within 60 days of receiving notice of a dismissal. 42 C.F.R. 498.72. Petitioner does not argue that it lacked notice within that 60-day period of the ALJ's June 4, 2001, dismissal of the administrative proceedings. Indeed, 60 days after the ALJ's dismissal, petitioner filed its August 3, 2001, suit in district court. Pet. App. 29a. Moreover, petitioner's counsel was served with the prior operator's withdrawal of the request for a hearing, C.A. J.A. 325, and petitioner made no attempt to continue the administrative proceedings despite prior notice from CMS that the agency intended to impose successor liability. Pet. App. 7a.

[2] Petitioner asserts (Pet. 10-11) that the decision in *Nursing Inn of Menlo Park*, Medicare & Medicaid Guide (CCH) ¶ 120,264 (HHS), 2001 WL 991181 (July 19, 2001), would have barred consideration of any request by petitioner for further administrative review. That decision, however, does not address a successor's right to seek administrative review of a civil money penalty imposed on the prior operator of a nursing facility.

Third, petitioner errs in asserting (Pet. 15) that the doctrine of election of remedies supports jurisdiction. Petitioner argues that, because the Secretary filed a claim for the civil money penalty in the bankruptcy proceedings commenced by the prior operator, he is now barred by the doctrine of election of remedies from attempting to collect the penalty from petitioner. That contention advances a substantive defense to a prospective collection action and, as such, has no bearing on the district court's subject matter jurisdiction to consider petitioner's challenge to the penalty determination. It is thus irrelevant to the threshold jurisdictional question raised by the petition.

Moreover, because successors-in-interest are jointly and severally liable for a civil money penalty, the Secretary's attempts to collect from the prior operator does not foreclose his attempt to collect from successors-in-interest. In any event, nothing in the election of remedies doctrine suggests that the Secretary would be estopped from collecting the penalty from petitioner in the circumstances presented here. The Secretary merely filed a claim in bankruptcy and did not recover the penalty from the prior operator. It is well-settled that the election of remedies doctrine, which, as petitioner notes, is intended to prevent double recovery for a single wrong, does not apply in such circumstances. See, *e.g.*, *Southern Pac. Co.* v. *Bogert*, 250 U.S. 483, 490-491 (1919).

Finally, the court of appeals' holding on the issues presented by the petition does not conflict with any other appellate authority. The Eighth Circuit, in *Deerbrook Pavilion, LLC* v. *Shalala*, 235 F.3d 1100, 1102 (2000), cert. denied, 534 U.S. 992 (2001), has held that, where a provider challenges the substantive valid-

ity of holding a successor liable for a civil penalty, rather than whether the prior operator's conduct warranted imposition of a penalty in the first instance, the provider may seek judicial review without exhausting Medicare's administrative remedies.

As the court of appeals concluded, however (Pet. App. 12a), *Deerbrook* is distinguishable. Petitioner challenges the adequacy of its opportunity to contest the findings of statutory and regulatory deficiencies that underlie the imposition of the penalty. Petitioner thus presents a challenge to the adequacy of the procedures used to impose the penalty rather than a challenge to the substantive validity of the Secretary's successor liability policy. *Deerbrook* does not address the means of obtaining jurisdiction over that issue and thus does not directly conflict with the court of appeals' holding here. Petitioner accordingly does not allege that the decision below conflicts with *Deerbrook* or other appellate authority and indeed does not cite *Deerbrook* in its petition.

3. Petitioner's procedural due process claim is also without merit and does not present any issue warranting further review by this Court. As noted above, the court of appeals concluded that the district court lacked subject matter jurisdiction over all of petitioner's claims and accordingly did not reach the merits of petitioner's due process claim. Even if petitioner could establish jurisdiction, however, its assertion that the Secretary violated the requirements of procedural due process is in error and does not raise an issue warranting further consideration by this Court.

The essential elements of procedural due process are notice and a meaningful opportunity to be heard. *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *Mullane*

v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950). Those requirements were clearly satisfied here. The district court held that petitioner had direct, actual notice of the potential imposition of successor liability. Pet. App. 34a-35a. That finding was affirmed by the court of appeals (*id.* at 20a), and petitioner does not challenge it here. Moreover, as the court of appeals found (*id.* at 19a-21a), petitioner, upon assuming its predecessor's provider agreement, had the right to continue the evidentiary hearing commenced by its predecessor and to seek administrative and judicial review of the imposition of a civil penalty before the penalty became final. Those rights satisfy the requirements of the Due Process Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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